

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON/NORTHERN/SANTA FE

AND

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES**

**Claimant:
Charles E. Slater**

**CASE NO. 54
AWARD NO. 55**

On February 2, 2001 the Brotherhood of Maintenance of Way Employees ("Organization") and the Burlington Northern/Santa Fe ("Carrier") entered into an Agreement establishing a Special Board of Adjustment in accordance with the provisions of the Railway Labor Act. The Agreement was docketed by the National Mediation Board as Special Board of Adjustment No. 1112 ("Board").

This Agreement contains certain relatively unique provisions concerning the processing of claims and grievances under Section 3 of the Railroad Labor Act. The Board's jurisdiction was limited to disciplinary disputes involving employees dismissed, suspended, or censured by the Carrier. Moreover, although the Board consists of three members, a Carrier Member, an Organization Member, and a Neutral Referee, awards of the Board only contain the signature of the Referee and they are final and binding in accordance with the provisions of Section 3 of the Railroad Labor Act.

Employees in the Maintenance of Way craft or class who have been dismissed or suspended from the Carrier's service or have been censured may choose to appeal their claims to this Board. The employee has a sixty (60) day period from the effective date of the discipline to elect to handle his/her appeal through the usual channels (Schedule Rule 40) or to submit the appeal directly to this Board in anticipation of receiving an expedited decision. An employee who is dismissed, suspended, or censured may elect either option. However, upon such election that employee waives any rights to the other appeal procedure.

This Agreement further establishes that within thirty (30) days after a disciplined employee notifies the Carrier Member of the Board, in writing, of one's desire for expedited handling of this appeal, the Carrier Member shall arrange to transmit one copy of the notice of the investigation, the transcript of the investigation, the notice of discipline and the disciplined employee's service record to the Referee.

These documents constitute the record of the proceedings and are to be reviewed by the Referee.

The Agreement further provides that the Referee, in deciding whether the discipline assessed should be upheld, modified, or set aside, will determine whether there was compliance with Schedule Rule 40; whether substantial evidence was adduced at the investigation to substantiate the charges made; and, whether the discipline assessed was arbitrary and/or excessive, if it is determined that the Carrier has met its burden of proof.

In the instant case, this Board has carefully reviewed each of the above-captioned documents prior to reaching findings of fact and conclusions.

BACKGROUND FACTS

Claimant, Charles E. Slater, a Grapple Truck Operator, was charged with the alleged theft and sale of railroad ties during the last half of August and the first half of September 2002.

A hearing was held on the 31st day of October 2001 in Klamath Falls, Oregon. He was dismissed based on the alleged violations of Rule 7.2.10 (Procedures for Sale of Ties), Rule 7.2.9 (Disposing of Ties) of BNSF Engineering Instructions Field Manual, Rule 1.13 (Reporting and Complying with Instructions), Rule 1.6 (Conduct) at (4) Dishonesty, Rule 1.26 (Gratuities), Rule 1.25 (Credit and Property) of Maintenance of Way Operating Rules and Rule S-1.2.5 (Safety Rules, Training Practices, Policies) of the Maintenance Way Safety Rules.

The applicable Rules are as follows:

BNSF Engineering Instructions Field Manual – April 1, 2002

7.2.10 Procedures for Sale of Ties

A. General Instructions

The sale of scrap, surplus, and obsolete Company material must be processed by Strategic Sourcing and Supply in the form of a Sales Authority. The appropriate approving officer (Division Engineer, Roadmaster, etc.) should request a Sales Authority. Furnish the following information regarding material to be sold:

- **Description of material**
- **Condition**
- **Specific type and quantity**
- **Location**
- **Contact person's name, phone number, and fax number.**

7.2.9 Disposing of Ties

The BNSF Railway Company replaces approximately 2 million ties annually that need to be removed from BNSF property and properly disposed of. The disposal of these ties must be handled in a judicious and environmentally safe manner to reduce or eliminate liabilities and responsibilities by BNSF for this material.

Removed ties are classified into two categories: scrap and reusable. Ties that are no longer functional to BNSF and cannot be sold for landscaping are categorized as scrap and are to be managed in one of two disposal methods:

1. (Preferred method) Ties are shipped to co-generation plants to be burned as an alternative fuel source.
2. Ties are disposed of in BNSF-approved landfills.

Maintenance of Way Operating Rules – January 31, 1999

- Rule 1.13 Reporting and Complying with Instructions**
Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.
- Rule 1.6 Conduct**
Employees must not be:
4. Dishonest
- Rule 1.26 Gratuities**
Employees must not discriminate among railroad customers. Employees must not accept gifts or rewards from customers, suppliers, or contractors of the railroad unless authorized by the proper manager.
- Rule 1.25 Credit and Property**
Unless specifically authorized, employees must not use the railroad's credit and must not receive or pay out on the railroad account. Employees must not sell or in any way get rid of railroad property without proper authority. Employees must care for all articles of value found on railroad property and promptly report the articles to the proper authority.

Maintenance of Way Safety Rules – January 31, 1999

- S-1.2.5 Safety Rules, Training Practices, Policies**
Comply with all company safety rules, training practices and policies, and Engineering Instructions.

It is the Carrier's position that the Claimant, the Grapple Truck Operator, sold used railroad ties to Bill Olney, the owner of Moe's Pizza, on several occasions. This anonymous hotline tip was corroborated by an independent investigation conducted by Special Agent Taylor.

In addition, the Carrier points out that the Claimant fully admitted to the theft and sale of the railroad ties. In response to the Organization's argument that the record does not constitute theft, the Carrier rebuts that the Claimant did not complete the process initiated to get permission to buy back the railroad ties. In response to the Organization's argument that the Claimant was denied his right to representation, the Carrier retorts that his Supervising Officer had a right to know what occurred. Moreover, the Carrier notes that it was a fair hearing and just investigation. Lastly, the Carrier asserts that the charges should not be dismissed, as there were no due process violations as the Organization contends. Based on all of the above, the Carrier requests that the Board deny this appeal and affirm this dismissal.

It is the position of the Organization that the Claimant was denied his procedural due process in multiple ways. The Organization contends that the hearing was unfair and prejudicial. In particular, the Organization points out that he was denied his right to Union representation by his Supervising Officer. Specifically, the Organization asserts that the Claimant was questioned and confessed, without representation. Thus, the Organization requests that this action subsequently be dismissed for the aforementioned due process violations.

Additionally, the Organization adds that the Claimant is a veteran for approximately thirty-years with an unblemished record. Besides, the Organization maintains that the Claimant had no intent to steal because he took the initiative to legally obtain permission to buy back the used railroad ties, according to the Regulations. Therefore, the Claimant was not dishonest, as the Carrier claims. Thus, the Organization requests that the Board reinstate the Claimant and make him whole. Based upon all the above, the Organization requests that the Claimant's appeal be granted.

FINDINGS AND OPINION

After a careful review of the record, the Board finds that the Claimant's appeal should be granted for the following reasons.

First, the most glaring due process violation was the denial of representation in violation of Rule 40 (F). It is true that a supervisor has the right to inquire what factually occurred, but that right of inquiry must stop when a Claimant specifically requests legal representation. Information gathered from the Claimant, after the denial of representation is no longer viable evidence and cannot be used against the Claimant. Thus, the motion to strike the confession is granted.

Second, the record reflects that the Claimant sought to buy back the railroad ties by legitimate means via "BNSF Employee's Request to Purchase Scrap Railroad Ties." (Exhibit 7) Evidence presented supports the fact that the Claimant filled-out the form and submitted it to Roadmaster Smith, as required. His intention is diametrically opposed to the intent to steal, a required element of theft. Thus, the Board does not find that the Claimant was dishonest.

Third, the investigation conducted by Special Agent Taylor and that of Officer Bellew differ in factual details. Such discrepancies are significant to note and do not make a compelling case for the Carrier.

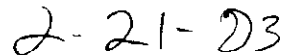
Fourth, in response to the Organization's argument that the Claimant was entrapped, the Board finds that the Supervising Officer's assertion requiring information regarding the Claimant's "work activities" to be deceptive and misleading. Evidence reveals that thereafter the Claimant, without representation, offered damaging information. Based on all of the above, the Board finds that the Claimant's appeal is granted. This dismissal shall be rescinded for the aforementioned reasons. However, the Claimant shall not be awarded back pay due to the Carrier's procedural due process error, as he is not without fault.

AWARD

Claimant, Charles E. Slater, shall be reinstated with his seniority rights unimpaired, but without back pay for reasons stated herein.



A.Y. McKissick
Neutral Chair
SBA No. 1112



Dated